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In the Supreme Court of the United States

OCTOBER TERM, 1991

KEYTON E. BARKER AND PAULINE BARKER, ET AL.,
PETITIONERS

v.

STATE OF KANSAS, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 4 U.S.C. 111, which codifies the constitutional doctrine of intergovernmental tax immunity, permits the State of Kansas to tax the retirement benefits of federal military retirees even though it exempts from taxation benefits paid to retired state and local employees.

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INTEREST OF THE UNITED STATES

Petitioners are representatives of a class of about 14,000 residents of the State of Kansas who have retired from service in the United States Armed Forces. The State of Kansas currently requires petitioners to pay taxes on the pensions they receive for their former federal military service, although it exempts from taxation pensions paid to retired employees of the State of Kansas and its political subdivisions. The United States has a substantial interest in ensuring that those to whom it pays pensions receive fair and equitable tax treatment from the States. The United States accordingly participated in *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989), in which this Court held that principles of intergovernmental tax immunity and 4 U.S.C. 111 prohibit a

State from taxing the pensions of federal retirees while exempting from tax the pensions of its own retirees. The United States has a similar interest in this case involving pensions paid to retired members of the Nation's armed forces.

STATUTORY PROVISIONS INVOLVED

1. The text of 4 U.S.C. 111 is set forth in Appendix A, *infra*.

2. The text of Kan. Stat. Ann. § 79-32,117 (Supp. 1990) is set forth in Appendix B, *infra*.

STATEMENT

1. Pursuant to Kan. Stat. Ann. § 79-32,117 (Supp. 1990), a taxpayer's adjusted gross income for purposes of the Kansas income tax is generally identical to that taxpayer's federal adjusted gross income (defined in 26 U.S.C. 62), increased by the items set forth in Section 79-32,117(b) and decreased by the items set forth in Section 79-32,117(c).[1] Because federal adjusted gross income includes retirement benefits without regard to source, see 26 U.S.C. 61(a)(11), all state and federal retirement benefits would be subject to taxation under this scheme unless specifically excluded by Section 79-32,117(c).

Pursuant to Section 79-32,117(c)(ii), adjusted gross income for Kansas purposes does not include amounts that "are specifically exempt from Kansas income taxation under the laws of the state of Kansas." Because various provisions of Kansas statutes exempt retirement benefits paid by the State and its political subdivisions,[2] this pro-

[1] The statute also provides for certain minor modifications related to estates, trusts, and partnerships, as set forth in Section 79-32,117(d) and (e).

[2] See, e.g., Kan. Stat. Ann. §§ 12-5005(e) (Supp. 1990), 13-14a10, 14-10a10 (1982) (exempting benefits paid to retired police officers and fire fighters under municipal retirement plans); Kan. Stat. Ann. § 20-2618 (Supp. 1990) (exempting benefits paid under a retirement

vision exempts state and local retirement benefits from taxation.[3]

By contrast, the statute excludes from adjusted gross income only two types of specifically identified federal retirement benefits: "[a]mounts received as annuities under the federal civil service retirement system, from the civil service retirement and disability fund,"[4] Section 79-32,117(c)(vii), and "[a]mounts received by retired railroad employees as a supplemental annuity under the provisions of 45 U.S.C. 228b(a) and 228c(a)(1) *et seq.*," Section 79-32,117(c)(viii).[5] All other federal retirement benefits are subject to taxation;[6] the most common bene-

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system for state judges); Kan. Stat. Ann. § 72-1768a (1985) (exempting benefits paid under a retirement system for school employees); Kan. Stat. Ann. § 74-49,105 (1985) (exempting benefits paid under a retirement system for court reporters); Kan. Stat. Ann. § 74-4923(b) (Supp. 1990) (exempting retirement benefits paid under the Kansas Public Employees Retirement System and Kansas Police and Fireman's Retirement System); Kan. Stat. Ann. § 74-4978g (Supp. 1990) (exempting benefits formerly accrued under the highway patrol pension fund); Kan. Stat. Ann. § 79-32,117(c)(ix) (Supp. 1990) (exempting benefits paid to retired city employees).

[3] The opinion of the Kansas Supreme Court did not identify any type of retirement benefit paid by a Kansas governmental unit that would be subject to the Kansas income tax scheme. See Pet. App. 9a (stating that "benefits paid to * * * state * * * and local government retirees are exempt from Kansas income tax").

[4] The Civil Service Disability and Retirement Fund covers participants in the Civil Service Retirement System, 5 U.S.C. 8301 *et seq.*, and in the Federal Employees' Retirement System, 5 U.S.C. 8401 *et seq.*, which generally encompasses federal civilian employees hired after December 31, 1983. See S. Rep. No. 166, 99th Cong., 1st Sess. 38-39 (1985).

[5] The latter provision apparently refers to portions of the Railroad Retirement Act of 1974, formerly codified in those sections of the United States Code. The analogous currently effective provisions are codified at 45 U.S.C. 231 *et seq.*

[6] Federal military retirees 62 years of age or older are entitled to a $120 tax credit against Kansas income tax. Kan. Stat. Ann.

fits subject to taxation are the federal military retirement benefits involved in this case.[7]

2. The named petitioners are representatives of a class of approximately 14,000 Kansas residents who are retired members of the United States Armed Forces (and, where applicable, their joint taxpayer spouses), all of whom were subject to Kansas income taxation on their military retirement benefits between 1984 and 1989. In 1989, petitioners filed two class actions contending that the Kansas taxation scheme violates the constitutional doctrine of intergovernmental tax immunity and 4 U.S.C. 111 because it discriminates in favor of state retirement benefits. See Pet. App. 3a-5a. The state district court rejected their claims. Pet. App. 36a-46a. It ruled that because retired federal military personnel are subject to recall to active duty, pensions payable to them are the functional equivalent of compensation for current services. Because the Kansas scheme taxes compensation for current services, the court perceived no discrimination against federal military retirees. *Id.* at 41a-44a.

3. The Kansas Supreme Court affirmed. Pet. App. 1a-35a. Citing this Court's holding in *McCarty* v. *McCarty*,

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§ 79-32,111b (1989). But this only partially mitigates the State's taxation of federal military retirement benefits. First, because many military personnel may retire after 20 years of service regardless of age, see, *e.g.*, 10 U.S.C. 3911 (Army), 6323 (Navy and Marine Corps), 8911 (Air Force), many military retirees are not eligible for the credit. Second, under applicable Kansas tax rates, this small credit is unlikely to shield the entire amount of retirement pay from state taxation. See Kan. Stat. Ann. § 79-32,110 (1989) (setting forth tax rates for Kansas income tax).

[7] In addition to federal military retirees, the Kansas system imposes an income tax on sums paid to retired Justices and judges of the United States under 28 U.S.C. 371; retired bankruptcy judges and magistrates under 28 U.S.C. 377; retired Claims Court judges under 28 U.S.C. 178; Foreign Service retirees under the Foreign Service Retirement and Disability Fund, 22 U.S.C. 4041 *et seq.*, 4071 *et seq.*; National Oceanic and Atmospheric Administration retirees under 33 U.S.C. 853*o*; and Public Health Service retirees under 42 U.S.C. 212.

453 U.S. 210 (1981), that a military pension was not subject to division in a divorce proceeding, as well as other decisions noting the continuing benefits and burdens that former military service places on a military retiree, see Pet. App. 17a-24a, the state supreme court agreed with the trial court's conclusion that pension benefits received by federal military retirees effectively are "reduced current compensation for reduced current services." Pet. App. 30a. The court held that the differences between military retirement benefits and traditional pension plans are sufficient to justify the disparate treatment. *Ibid.*

SUMMARY OF ARGUMENT

The decision of the Kansas Supreme Court misinterprets and misapplies the constitutional doctrine of intergovernmental tax immunity, as codified in 4 U.S.C. 111 and explicated by this Court in *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989). That doctrine prohibits direct state taxation of the federal government and, of pertinence here, prohibits the States from imposing more burdensome taxation upon those who deal with the federal government than upon those who deal with the State. If the State's tax structure discriminates against those who deal with the federal, rather than state, government, the disparate treatment is unlawful unless the tax classification is directly related to and justified by significant differences between the two classes. See *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 383 (1960). In this case, Kansas has discriminated against federal military retirees, and in favor of state government retirees, without any justification reflecting significant differences between the two classes.

Kansas taxes federal military retired pay while completely exempting the retirement benefits received by state and local employees. The substantive features of the military retirement system identified as distinct by the Kansas Supreme Court—such as the continuing applica-

bility of the Uniform Code of Military Justice to military retirees and the possibility of involuntary recall to service —do not justify Kansas's regime. The overall structure of the Kansas tax system makes clear that Kansas has singled out military retired pay for disparate treatment based on the source of the benefits, not on the features identified by the Kansas Supreme Court.

In any event, military retirement benefits are in most relevant respects much more like other retirement benefits than like current wage income. Moreover, Kansas treats military retired pay as current compensation when that treatment will increase the State's tax revenues, but not when such treatment has a contrary effect. Finally, the Kansas Supreme Court erred in asserting that the differing manner of funding military, as opposed to state, retirement benefits justifies the State's disparate tax treatment; a truly nondiscriminatory tax would operate by reference to the manner of funding, and not the federal source of retirement benefits. Accordingly, the rationale of this Court's decision in *Davis* is controlling here; the Kansas Supreme Court erred in concluding otherwise.

ARGUMENT

I. THE DOCTRINE OF INTERGOVERNMENTAL TAX IMMUNITY PROHIBITS THE STATES FROM GIVING LESS FAVORABLE TAX TREATMENT TO THOSE WHO DEAL WITH THE FEDERAL GOVERNMENT THAN IT GIVES TO THOSE WHO DEAL WITH THE STATE

In 4 U.S.C. 111,[8] Congress has generally consented to state taxation of federal employees, subject to the limitation that "the taxation does not discriminate against the * * * employee because of the source of the pay or compensation." As this Court observed in *Davis*, the nondiscrimination clause in Section 111 codifies the prohibi-

[8] Congress enacted 4 U.S.C. 111 as part of the Public Salary Tax Act of 1939, ch. 59, § 4, 53 Stat. 575.

tion against discriminatory taxation embodied in the modern constitutional doctrine of intergovernmental tax immunity. 489 U.S. at 812-813. The doctrine's origins trace back to *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Court grounded its holding (invalidating a state tax levied upon bank notes issued by a national bank) in the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, explaining that "if the right of the States to tax the means employed by the general government be conceded, the declaration that the constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is empty and unmeaning declamation." 17 U.S. (4 Wheat.) at 433. The impropriety of such taxation, the Court explained, arose from the fact that "when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others as well as themselves, for the benefit of others in common with themselves." *Id.* at 435.

In its modern form,[9] the doctrine of intergovernmental tax immunity relies heavily on the principle of nondiscrimination to police the dangers identified by the *McCulloch* Court.[10] See, *e.g.*, *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 485-487 (1939). By tying state taxation of those dealing with the United States to state taxation of those dealing with the State itself, the non-

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[9] Prior to the 1930s, the doctrine of intergovernmental tax immunity prohibited state taxation of those who contracted with the United States "whenever the effect of the tax was or might be to increase the cost to the Federal Government of performing its functions." *United States* v. *County of Fresno*, 429 U.S. 452, 460 (1977). For example, the Court applied the doctrine "to exempt the salaries of all officers of the United States from taxation by the states." *Dobbins* v. *Commisioners of Erie County*, 41 U.S. (16 Pet.) 434, 448 (1842).

[10] The doctrine of intergovernmental tax immunity also prohibits direct taxation of one sovereign by the other. *Davis*, 489 U.S. at 811.

discrimination principle addresses the structural concerns expressed in *McCulloch* by ensuring parity of treatment. "[T]he best safeguard against excessive taxation (and the most judicially manageable) is the requirement that the government tax in a nondiscriminatory fashion. For where a government imposes a nondiscriminatory tax, * * * the threat of destroying another government can be realized only if the taxing government is willing to impose taxes that will also destroy itself or its constituents." *South Carolina* v. *Baker*, 485 U.S. 505, 526 n.15 (1988); see also *Washington* v. *United States*, 460 U.S. 536, 546 (1983).

In applying this principle, the Court has strictly enforced a rule of equal treatment, rejecting the more deferential level of scrutiny typically applied to economic classifications under the Equal Protection Clause. See *Davis*, 489 U.S. at 816. When a State legislates concerning economic matters unrelated to the activities of the federal government, the "power to classify is * * * extremely broad, and [the State's] discretion is limited only by constitutional rights and by the doctrine that a classification may not be palpably arbitrary." *Phillips Chemical Co.* v. *Dumas Independent School District*, 361 U.S. 376, 385 (1960).[11] But when a State taxes those who deal with the federal government—requiring the government's interests to be "weighed in the balance"—the State must treat those taxpayers "as well as it treats those with whom it deals itself." *Ibid.*[12]

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[11] See *City of Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985) (citations omitted), with regard to the Equal Protection Clause of the Fourteenth Amendment:

> The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. When social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.

[12] As this Court has noted, "[t]he danger that a State is engaging in impermissible discrimination against the Federal Govern-

In analyzing whether a State unlawfully discriminates against those dealing with the federal government, it is first "necessary to determine how other taxpayers similarly situated are treated." *Phillips Chemical*, 361 U.S. at 383. This, in turn, "requires 'an examination of the whole tax structure of the state.'" *Ibid.* (quoting *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940)); accord, *Washington* v. *United States*, 460 U.S. at 542, 545. If taxpayers dealing with the United States bear a heavier burden than similarly situated taxpayers dealing with the State, the tax classification violates the Constitution unless it is "directly related to, and justified by, 'significant differences between the two classes.'" *Davis*, 489 U.S. at 816 (quoting *Phillips Chemical*, 361 U.S. at 383).

Of central relevance here, this Court in *Davis* invalidated Michigan's income tax to the extent that it taxed the benefits of federal retirees while exempting retirement benefits paid by the State. Because Michigan's tax structure facially discriminated against those who dealt with the federal government, the Court's analysis concentrated on the State's proffered justifications for the disparate treatment. The Court rejected the contention that the State could justify the disparity based on its interest in hiring and retaining state employees. Implicitly contrasting the requirements of Section 111 with equal protection analysis, the Court held that "[t]he State's interest in adopting the discriminatory tax, no matter how substantial, is simply irrelevant to an inquiry into the nature of the two classes receiving inconsistent treatment." 489 U.S. at 816. The Court also rejected the State's argument that more favorable tax treatment for state retirees was justified by the higher level of benefits typically paid to federal retirees, reasoning that "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits * * *; rather, it would

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ment is greatest when the State acts to benefit itself and those in privity with it." *Davis*, 489 U.S. at 815 n.4.

discriminate on the basis of the amount of benefits received by individual retirees." *Id.* at 817.[13] Because Kansas discriminates against federal military retirees by taxing their benefits while exempting those received by state and local government retirees, and because the State has proffered no coherent and consistent justification for the disparity, *Davis* controls this case.

II. KANSAS IMPOSES A HEAVIER TAX BURDEN ON FEDERAL MILITARY RETIREES THAN ON STATE PUBLIC EMPLOYMENT RETIREES DESPITE A LACK OF "SIGNIFICANT DIFFERENCES" BETWEEN THE TWO CLASSES OF RETIREES

The Kansas Supreme Court erred in holding that the State's facially discriminatory taxation of federal military retirement benefits is justified by significant differences between those benefits and the benefits received by state and local government retirees. As relevant here, military retired pay does not differ significantly from other forms of deferred compensation. Both military and civilian employees retire and receive retirement benefits only upon satisfying statutory requirements for eligibil-

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[13] Similarly, in *Phillips Chemical* the Court invalidated a state tax that placed a heavier tax burden on those who leased property from the federal government, rather than from the State and its political subdivisions. The Court was unpersuaded by the State's argument that, in view of the scale of federal leases, equally favorable tax treatment for such leases would have an adverse impact on local government. The Court found that "the classification * * * [was] not based on such factors"; rather, it was based on "the identity of the * * * lessor." 361 U.S. at 384-385. In addition, although the State asserted that it could make up in rents what it lost in lower taxes on leases of state, but not federal, public lands, the Court observed that a political subdivision (*e.g.*, a school board) could not make up in rents what it lost in taxes because of tax exemption given to the State's, as opposed to its own, lessees. *Id.* at 384. Hence, the State's proffered rationale did not explain the disparate taxation of lessees of state and local, as opposed to federal, lands.

ity.[14] Like their civilian counterparts, military retirees cease to receive their regular salary upon retirement, and become entitled only to retirement pay.[15] Finally, as with military retired pay, the retirement benefits received by state public employees are typically based upon years of service and highest average pay rank achieved.[16] Despite these similarities, the Kansas income tax applies to re-

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[14] Retirement from the uniformed services generally requires the member to accrue a specified length of service, typically no fewer than 20 years. See, *e.g.*, 10 U.S.C. 3911 *et seq.* (Army), 6321 *et seq.* (Navy and Marine Corps), 8911 *et seq.* (Air Force). Subject to limited exceptions, members of the Armed Services also face mandatory retirement at age 62 irrespective of their years of service. 10 U.S.C. 1251. Under Kansas law, the "normal retirement date" for members of the Kansas Public Employees Retirement System is either at age 65, age 60 with 35 years of credited service, or any age with 40 years of credited service. Kan. Stat. Ann. § 74-4914(1) (Supp. 1990); see also, *e.g.*, Section 74-4914c(1) (correctional security officers may retire at age 50 with three consecutive years of credited service prior to retirement, or upon accruing ten years of credited service and reaching age 50); Section 74-4957(1) (for police officers or fire fighters employed before July 1, 1989, normal retirement age is generally at age 55 with 20 years of credited service).

[15] Only service members on active duty or some other form of full-time duty are entitled to basic pay and associated benefits. 37 U.S.C. 204(a), 402(a), 403(a).

[16] The amount of retirement pay to which a military retiree is entitled ordinarily depends on the number of years of service. 10 U.S.C. 3991(a)(1) (Army), 6333(a) (Navy), 8991(a)(1) (Air Force). The general rule is that a retired member is entitled to a stated percentage of his or her level of pay at retirement, multiplied by the years of creditable service. 10 U.S.C. 1406, 1407, 1409. In general, an employee retiring at the normal retirement age under the Kansas Public Employee Retirement System receives a retirement benefit calculated as a percentage of the retiree's highest annual salary, multiplied by years of credited service. See Kan. Stat. Ann. § 74-4915(1) (Supp. 1990); see also, *e.g.*, Section 74-4958 (police officers and fire fighters retiring at normal retirement age receive a percentage of their final average salaries, multiplied by years of credited service).

tirement benefits paid to military retirees, but not those paid to state and local government retirees. Pet. App. 9a.

The principal basis relied upon by the Kansas Supreme Court to justify its disparate taxation scheme is the continuing effect federal law has on retired members of the Armed Forces. See Pet. App. 16a-24a. A retired service member remains a member of the Armed Forces,[17] continues to be subject to the Uniform Code of Military Justice,[18] as well as other restrictions on post-retirement activities,[19] and may be ordered into active duty.[20] See *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 & n.14 (1981). And in a variety of contexts federal cases have treated continuing obligations that accompany the receipt

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[17] See *United States* v. *Tyler*, 105 U.S. 244 (1882); 10 U.S.C. 3075(a) ("The Regular Army is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law, and of retired members of the Regular Army."), 8075(a) ("The Regular Air Force is the component of the Air Force that consists of persons whose continuous service on active duty in both peace and war is contemplated by law, and of retired members of the Regular Air Force.").

[18] See 10 U.S.C. 802(a)(4) (making "[r]etired members of a regular component of the armed forces who are entitled to pay" subject to the UCMJ).

[19] For example, a retired officer who takes a civilian position with the federal government may have his retired pay reduced under 5 U.S.C. 5532. In addition, for three years after retirement, a retired officer may not receive retired pay if he "is engaged * * * in selling, or contracting or negotiating to sell, supplies or war materials" to specified federal agencies. 37 U.S.C. 801(b). And a retired officer faces criminal sanctions if, within two years of his release from active service, he represents any person in making a sale through the military department in which he is retired, 18 U.S.C. 281(a), or acts as an attorney or agent in prosecuting any claim involving his department or any subject matter in which he was directly involved while on active duty, 18 U.S.C. 281(b).

[20] See, *e.g.*, 10 U.S.C. 688(a) (a retired member of the Armed Forces "may be ordered to active duty by the Secretary of the military department concerned at any time").

of military retired pay as legally significant.[21] But none of those cases considered the nature of those obligations in connection with intergovernmental tax immunity or the meaning of 4 U.S.C. 111.[22] For several reasons, the con-

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[21] See, *e.g.*, *United States* v. *Tyler*, 105 U.S. 244, 245 (1882) (retired officer technically remains "in the service" for purposes of statute authorizing specified percentage pay increase for "every five years' service"); *Cornetta* v. *United States*, 851 F.2d 1372, 1382-1383 (Fed. Cir. 1988) (potential liability for retired pay does not constitute prejudice for purposes of laches); *United States* v. *Tafoya*, 803 F.2d 140, 142 (5th Cir. 1986) (government may not offset military retired pay against debt owed by retiree); *Costello* v. *United States*, 587 F.2d 424, 427-428 (9th Cir. 1978) (no vested right in existing method of calculating retired pay), cert. denied, 442 U.S. 929 (1979); *Berkey* v. *United States*, 361 F.2d 983 (Ct. Cl. 1966) (addressing heir's claim to accumulated retired pay of veteran who died while in veteran's hospital); *Hooper* v. *United States*, 326 F.2d 982, 987-988 (Ct. Cl.) (upholding application of UCMJ to retired members), cert. denied, 377 U.S. 977 (1964); *Hostinsky* v. *United States*, 292 F.2d 508, 510 (Ct. Cl. 1961) (retired Navy officer subject to dual compensation statute); *Lemly* v. *United States*, 75 F. Supp. 248 (Ct. Cl. 1948) (considering claim for military retired pay under Naval Aviation Personnel Act of 1940); *In re Siverling*, 72 Bankr. 78, 78-79 (W.D. Mo. 1987) (military retired pay is not property of bankrupt estate).

[22] Several post-*Davis* decisions of state supreme courts have addressed the character of military retired pay in assessing claims brought under Section 111. The present case aside, those decisions have consistently treated military retired pay as analogous, for purposes of Section 111, to more traditional retirement benefits. See, *e.g.*, *Kuhn* v. *Colorado*, 817 P.2d 101, 108 (Colo. 1991) (en banc) ("While it is true that Congress may have intended some portion of military retirement benefits to be current compensation for responsibilities accrued after retirement, * * * the overall scheme of the retirement benefits is akin to a civilian pension earned by the service member for years of active service."), petition for cert. pending, No. 91-980; *Pledger* v. *Bosnick*, 306 Ark. 45, 58, 811 S.W.2d 286, 291-292 (1991) (for purposes of class certification in a Section 111 action, military retirement benefits are properly viewed as "deferred compensation or in the nature of a pension"), petition for cert. pending, No. 91-375; *Hackman* v. *Director of Revenue*, 771 S.W.2d 77, 80 (Mo. 1989) (en banc) (*Davis* applies to claim brought by federal military retiree; Section 111 "draws no

tinuing effects of military service do not justify the disparities in taxation imposed by the Kansas scheme.

A. Kansas Does Not Evenhandedly Exempt Retirement Benefits Based on any Rational Connection with the Retiree's Ongoing Obligations

Consideration of "the whole tax structure of the state," *Phillips Chemical*, 361 U.S. at 383, reveals that Kansas exempts *all* state retirement benefits, but only certain federal benefits, identified by their source and not by characteristics that are relevant to tax policy. The substantive features of the military retirement system upon which the Kansas Supreme Court relied—the post-retirement restrictions placed upon the conduct of military retirees and the possibility of recall to active duty service—do not explain or justify the State's discriminatory income tax. As in *Davis* and *Phillips Chemical*, this Court should reject the State's "proffered rationale" for its discriminatory tax system because "an evenhanded application of the rationale" would result in a system of taxation that is substantially different from the one presently in effect. *Davis*, 489 U.S. at 817; see *Phillips Chemical*, 361 U.S. at 384-385.

1. Membership in the Armed Forces: Before turning to the substantive features of the military retirement system cited by the Kansas Supreme Court, we submit that the court erred in relying, Pet. App. 16a-17a, on the military status of retired service members as justifying discriminatory taxation. The statutory denomination of retired service members as remaining part of the service in which they have retired may have consequences when federal law operates by reference to such a status. Cf. *United States* v. *Tyler*, 105 U.S. 244, 246 (1882) (retired officers under former military pay statutes are entitled to pay increase awarded based on years of "service"). To justify state taxation of individuals merely by ref-

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distinction between federal military personnel and civil service personnel"), cert. denied, 493 U.S. 1019 (1990).

erence to their military status, however, lacks any basis in legitimate objectives of tax policy, and would impermissibly disadvantage citizens because of their service to the Nation, cf. *Carrington* v. *Rash*, 380 U.S. 89, 95-97 (1965), and their status as federal officers, 4 U.S.C. 111. Obviously, a State could not justify imposition of a greater tax burden on active-duty servicemembers than on other wage earners based on their military status. The same principle applies no less to retirees. Indeed, if Kansas were authorized to discriminate in income taxation because of the mere status of a taxpayer, the State's authority to "elevate form over substance," *Washington* v. *United States*, 460 U.S. at 544, would render the protections of intergovernmental tax immunity illusory.

While there are assuredly substantive consequences attached to the status of a military retiree, the military retirement system's distinctive features must be evaluated on their own terms, and not by reference to a label that Congress has affixed to retired service members.[23] As we now show, the substantive features associated with military retired status do not justify Kansas's discriminatory tax scheme.

2. Post-retirement restrictions: The fact that retired members of the Armed Forces are subject to certain restrictions on post-employment activities (including the substantive rules found in the UCMJ) neither explains nor justifies the unfavorable tax treatment that Kansas visits upon federal military retirees. First, these restrictions do not constitute employment (*i.e.*, they do not amount to a rendering of services for which the government pays the retiree compensation), and, so long as they are observed, they have no effect on the retiree's entitle-

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[23] Indeed, federal statutes recognizing that a retired member remains part of the service from which the member retired distinguish on their face between "retired members" and those "whose continuous service on active duty in both peace and war is contemplated by law." 10 U.S.C. 3075(a) (Army), 8075(a) (Air Force).

ment to or level of retirement benefits.[24] Second, Kansas imposes many similar post-employment restrictions upon its own retirees,[25] but does not tax their retirement benefits. Third, Kansas exempts benefits for federal retirees under the Civil Service Retirement System, even though the federal retirees remain subject to significant post-employment federal restrictions on their activities.[26]

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[24] Military retired pay does not compensate the retiree for the restrictions on post-retirement conduct. Military retirement benefits are calculated according to the retiree's years of service and rank achieved, see, *e.g.*, 10 U.S.C. 1406, 1407, 1409, and retirees receiving various levels of benefits are subject to the same restrictions. Indeed, even retirees who engage in post-retirement federal employment that results in the reduction of their retired pay, 5 U.S.C. 5532, nevertheless remain subject to other post-retirement restrictions upon servicemembers.

[25] For example, if a state employee retiring after June 30, 1988, accepts employment with any employer within the Kansas Public Employee Retirement System for whom the retiree worked during the two years before retirement, and then earns more than a specified amount, the retiree forfeits his or her retirement benefits while so employed. Kan. Stat. Ann. § 74-4914(6) (Supp. 1990). In addition, if a retired member of the police and fire fighter's pension system works for more than 30 days during a calendar year for "the same state agency or the same police or fire department of any county, city, township or special district or the same sheriff's office of a county," the retiree forfeits retirement benefits for any month in which he or she occupies the position. Kan. Stat. Ann. §§ 74-4957(5), 74-4957a(4) (Supp. 1990). And if a state employee has participated in contracting with any person or business within the employee's last two years of public employment, the employee may not accept a job with that person or business for a year after the employee's public service terminates. Kan. Stat. Ann. § 46-233(a) (1986).

[26] Certain federal retirees forfeit their retirement benefits if they are convicted of enumerated offenses relating to national security, 5 U.S.C. 8312; if they flee the country to avoid being prosecuted for such offenses, 5 U.S.C. 8313; if they refuse to testify regarding their former federal service as it relates to various matters of national security, 5 U.S.C. 8314; or if they materially falsify any federal employment application relative to specified national security matters, 5 U.S.C. 8315. In addition, a retiree, as a former federal

Fourth, although a retired service member may face somewhat more extensive post-retirement restrictions than a typical state or federal retiree, because of the UCMJ's continuing applicability, that fact does not explain and would not, in any case, justify the discrimination here, since Kansas also taxes the retirement benefits of various federal retirees who are not subject to that or any similar Code.[27] Kansas has not classified retirees, for tax purposes, based on the existence *vel non* of restrictions on post-retirement conduct; rather, it has singled out federal retirees, including retired servicemembers, for disadvantageous tax treatment based on the source of their retirement benefits.

3. Potential recall to active duty: Contrary to the Kansas Supreme Court's reasoning, Pet. App. 30a, the disparate treatment of military retirement benefits under the State's tax structure cannot be explained by a distinction between benefits payable to retirees who are subject to continuing service obligations and benefits payable to

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employee, is sharply limited in the extent to which he or she may represent persons before a federal agency concerning matters in which the former employee participated while in government. 18 U.S.C. 207(a) and (b).

[27] As we have discussed, see pp. 3-4, *supra*, Kansas exempts federal retirement benefits only if they are received either from the Civil Service Retirement and Disability Fund or by a retired railroad employee. Section 79-32,117(c)(vii) and (viii). Hence, Kansas taxes benefits received by certain Central Intelligence Agency employees whose benefits are paid from the Central Intelligence Agency Retirement and Disability Fund, 50 U.S.C. 403 note (Title II). Pet. App. 29a. The UCMJ does not apply to such retirees. See 10 U.S.C. 802(a). Officers serving in the National Oceanic and Atmospheric Association or the Public Health Service are subject to the UCMJ only when they are "assigned to and serving with the armed forces," 10 U.S.C. 802(a)(8), which evidently contemplates active duty. Kansas, however, fully taxes benefits received by NOAA and PHS retirees. Pet. App. 29a. Kansas also taxes the benefits received by Foreign Service officers from the Foreign Service Retirement and Disability Fund, 22 U.S.C. 4042, 4071a(2), even though the UCMJ does not apply to Foreign Service retirees.

other retirees. For example, whereas Kansas exempts the retirement benefits of state court judges, Kan. Stat. Ann. § 20-2618 (Supp. 1990), it taxes the benefits paid to retired federal judges under 28 U.S.C. 371(a), even though a federal judge who retires under that Section is not required to provide any current services to receive retirement salary.[28] Kansas also taxes the benefits of other federal retirees who are not subject to post-retirement obligations such as potential mandatory recall into service.[29] Thus, contrary to the state supreme court's reasoning, the distinction between Kansas's complete exemption of state and local retirement benefits, and its selective exemption of federal retirement benefits, is not based on a coherent rationale related to the contingent obligation of potential recall to service; rather, certain federal retirement benefits are taxed because of their

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[28] Through a process termed "retirement from office by resignation on salary," 28 U.S.C. 376(a)(2)(A), a qualifying federal judge may retire completely from federal judicial service and receive a lifetime annuity equal to his or her salary at the time of retirement, 28 U.S.C. 371(a). That would be subject to taxation under the Kansas scheme.

[29] For example, Kansas taxes retirement benefits received by certain CIA retirees, see note 27, *supra*, even though Section 271 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees makes clear that the retirees may be recalled to service only with their consent. See 50 U.S.C. 403 note. In addition, although Claims Court judges retiring pursuant to 28 U.S.C. 178 may continue to collect their annuities even if they elect not to perform continuing duties, 28 U.S.C. 178(j)(4), Kansas taxes the benefits paid under Section 178 because they are paid from the Claims Court Judges Retirement Fund, 28 U.S.C. 178(*l*)(1). And while certain PHS retirees may receive retirement benefits without being subject to involuntary recall to active duty, 42 U.S.C. 211(g)(3), 212(c), Kansas taxes their retirement benefits. The same is so with respect to noncareer Foreign Service officers who are taxed on the retirement benefits they receive from the Foreign Service Retirement and Disability Fund, see note 27, *supra*, but who are not even eligible for recall, cf. 22 U.S.C. 3948.

source.[30] Section 111, on its face, prohibits such a system of taxation.[31]

B. Military Retired Pay Is Not Analogous to Compensation Received by Current State and Local Employees

Even if Kansas's taxation of retirement benefits were otherwise evenhandedly applied, the possibility that military retirees will be recalled to service would not justify

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[30] The source-based approach of Kansas's taxation of federal retired pay is well illustrated by the State's tax treatment of federal bankruptcy judges and magistrates. Those officers may elect to receive retirement benefits through the Judicial Officers' Retirement Fund, 28 U.S.C. 377(f) and (h), instead of participating in the Civil Service Retirement System and receiving benefits from the Civil Service Retirement and Disability Fund, 5 U.S.C. 8348. See 28 U.S.C. 377(f)(1); see also 5 U.S.C. 8334(a)(1), 8336(k). As noted, benefits paid from the latter fund are exempt from taxation under Section 79-32,117(c)(vii). No similar exemption is available for benefits received from the Judicial Officers' Retirement Fund, even though a bankruptcy judge or magistrate may continue to receive benefits under that system without any possibility of recall to service. See 28 U.S.C. 377(m)(1)(B) and (m)(2).

[31] The Kansas Supreme Court suggested that the treatment of other federal retirees under state law is irrelevant to this case, because "[t]he legal interests of other federal retirees are not at issue in this appeal." Pet. App. 29a. We disagree. Although other federal retirees are not parties to this case, this Court's precedents make it clear that the decision whether a state tax scheme discriminates "requires 'an examination of the whole tax structure of the state.'" *Phillips Chemical Co.*, 361 U.S. at 383 (quoting *Tradesmens Nat'l Bank* v. *Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940)). The Kansas Supreme Court indicated that it would have found it relevant "[i]f another class of federal retirees had exactly the same characteristics as the class of military retirees and was taxed differently." Pet. App. 29a. That concession concerning the relevance of the tax structure of the State is too narrow. In determining whether Kansas taxes military retirees' pay because of the federal source of their pay, and not the continuing obligations associated with its receipt, it is also relevant that, as we have shown, the State also taxes other federal retirees who do *not* share the identified characteristics of federal military retirees.

the State's treating military retired pay, for tax purposes, as it treats pay for current services by state and local employees. As the Court's analysis in *McCarty* reflects, military retired pay is much more closely analogous to deferred, rather than current, compensation paid to state and local employees:

> The amount of retired pay a service member receives is calculated not on the basis of the continuing duties he actually performs, but on the basis of years served on active duty and the rank obtained prior to retirement. Furthermore, *should the service member actually be recalled to duty, he receives additional compensation according to the active duty pay scale,* and his rate of retired pay is also increased thereafter.

453 U.S. at 223 n.16 (emphasis added).[32] In other words, while the receipt of military retired pay carries with it the contingent obligation of recall to active service, reali-

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[32] The Court in *McCarty* did note that military retired pay differs in some respects from a typical pension. 453 U.S. at 221-222. But the Court did not rest its holding—that a State may not treat military retired pay as property of the marital estate upon dissolution of a marriage—on a view of such benefits as current, rather than deferred, compensation. *Id.* at 223. Moreover, Congress promptly passed a statute to remove the effect of *McCarty*, subjecting military retired pay to the general rule permitting the division of retirement benefits upon divorce. See Uniformed Services Former Spouses' Protection Act, 10 U.S.C. 1408(c)(1) (subject to certain limitations, States may treat disposable military retired pay as "property of the member and his spouse"); *Mansell* v. *Mansell*, 490 U.S. 581, 584-585, 587-588 (1989); S. Rep. No. 502, 97th Cong., 2d Sess. 10 (1982) (the "primary purpose" in enacting the USFSPA was to permit the States "to treat military pensions in the same manner as they treat other retirement benefits"). The USFSPA therefore reflects Congress's judgment that military retirement benefits are sufficiently analogous to deferred compensation to permit the States to treat such benefits as property earned during marriage. Cf. *McCarty*, 453 U.S. at 221 ("The community property division of military retired pay rests on the premise that that pay, like a typical pension, represents deferred compensation for services performed during the marriage.").

zation of that contingency results in compensation other than retired pay for any services that are *actually* rendered by the retiree. Thus, it is the compensation for active service by a military retiree, if and when recalled, and not the retired pay preceding or following such a recall, that is comparable to the pay that is received by state and local employees for current services and taxed in full by the State.

C. Federal and Kansas Tax Law Treat Military Retired Pay as Deferred Compensation for Certain Purposes

The rationale of the Kansas Supreme Court is undermined further by the treatment of federal retirement benefits as deferred compensation, not current compensation, under other provisions of federal and state tax law. For example, in federal tax law, the distinction between current and deferred compensation is crucial under 26 U.S.C. 219, which governs the deductibility of taxpayer contributions to an individual retirement account (IRA). Under Section 219(b), the IRA deduction is limited to the amount of the taxpayer's compensation for the tax year or $2000, whichever is less. Section 219(f)(1) clarifies that " 'compensation' does not include any amount received as a pension or annuity and does not include any amount received as deferred compensation." It is well settled that federal military retirement benefits are excluded from the term "compensation" for purposes of Section 219(f)(1). See M. Weinstein, *Mertens: The Law of Federal Income Taxation* § 25C.12, at 58 (1988) ("Retirement income, including federal, civil and military retirement income, is not compensation for purposes of making deductible contributions to an IRA." As the Kansas Supreme Court acknowledged in this case, Pet. App. 24a-25a, the Kansas tax scheme follows this treatment precisely, recognizing that there is no significant difference between military retirement pay and other types of retirement benefits.[33]

[33] Moreover, following the enactment of 10 U.S.C. 1408, which authorizes the States to treat military retired pay as property for

The Kansas Supreme Court attempted to justify this treatment by explaining that "this limited definition of 'compensation' applies to § 219 *only*." Pet. App. 25a. That may be, but this does not undermine the logical inference to be drawn from the definition in Section 219: Kansas treats military retired pay as current compensation when that characterization increases its tax revenues, but declines to do so when it would produce the contrary tax consequences. The State's failure to treat military retired pay consistently suggests that the State's articulated rationale is not in fact the basis for the disparate treatment, but only a cloak for discrimination against federally funded benefits. The State has singled out military retired pay for unfavorable tax treatment based not upon any coherent rationale related to the character of that pay as current compensation for reduced services, but upon the State's desire to maximize its tax revenues while exempting state and local employees from taxation of their retirement benefits.

D. Differences in Funding Methods Do Not Justify the Discrimination Between State Government Pensions and Military Retired Pay

The Kansas Supreme Court also suggested, Pet. App. 26a, that different tax treatment might be justified by the difference in funding methods: whereas military retired pay is funded out of general revenues, the state and local retirement system is funded through employer and employee contributions.[34] The court found this considera-

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purposes of marital division, Kansas enacted a statute that treats "the present value of any vested or unvested military retirement pay" as "marital property." Kan. Stat. Ann. § 23-201(b) (1988). The State's inclusion of the present value of the future stream of military retired pay among the property of the marital estate is inconsistent with the State's treatment of such pay as current compensation for purposes of income taxation. Cf. *McCarty*, 453 U.S. at 221.

[34] To the extent the court's suggestion relies on the federal practice of paying benefits out of general revenues rather than annual

tion significant because Kansas taxes a state or local government employee's contribution to the retirement system as income in the year in which the contribution is made. *Ibid.*; see Kan. Stat. Ann. §§ 74-4919(2), 79-32,117(b)(vi) (Supp. 1990). Because a part of the retirement benefits received by state and local retirees therefore reflects previously taxed contributions, the court indicated that Kansas's disparate treatment of military retired pay merely compensates for the unavailability of previously taxable employee contributions under the military retirement system. Pet. App. 26a.

This is unpersuasive. Kansas retirement benefits are funded not only through employee contributions, but also through government contributions, see, *e.g.*, Kan. Stat. Ann. § 74-4920b (Supp. 1990), and pension fund investments, see, *e.g.*, Kan. Stat. Ann. § 74-4921 (Supp. 1990). Thus, the state supreme court would justify the State's taxation of the *full* measure of military retired pay on the ground that *part* of the benefits received by state and local employees—the sum attributable to employee contributions—had previously been taxed. Pet. App. 26a.

This rationale is foreclosed by *Davis*, in which the State sought to justify its tax discrimination against federal retirees by arguing that their retirement benefits typically exceed those of state retirees. 489 U.S. at 816-817. The Court rejected that contention because "[a] tax exemption truly intended to account for differences in retirement benefits would not discriminate on the basis of the source of those benefits * * *; rather, it would discriminate on the basis of the amount of benefits received

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contributions, the suggestion is baseless; it is no concern of state tax policy where the federal government gets the money to pay retirement benefits. To the extent the suggestion relies on the federal practice of not requiring employee contributions, the distinction is unsupported by the facts, because Kansas law exempts *all* retirement benefits Kansas governmental authorities pay, even though a significant portion of those benefits is funded directly by the State. See, *e.g.*, Kan. Stat. Ann. § 74-4920b (Supp. 1990) (discussing employer contributions to the Kansas Public Employees Retirement System).

by individual retirees." *Id.* at 817. By the same token, a tax truly intended to account for prior taxation of retirement benefits would not discriminatorily exempt certain benefits based on their source; rather, it would apply to retirement benefits generally, but exempt benefits to the extent that they reflect previously taxed contributions.[35]

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There is, in sum, no coherent or consistently applied rationale that can justify Kansas's facially discriminatory taxation of military retirement benefits. It follows that 4 U.S.C. 111, as interpreted by this Court in *Davis*, prohibits that taxation.

CONCLUSION

The judgment of the Kansas Supreme Court should be reversed.

Respectfully submitted.

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[35] Even if military retired pay were contributory, and the employee contributions were subject to taxation when made, not all of the benefits received by federal military retirees in Kansas would previously have been taxed by the State; a Kansas military retiree may well have performed part or all of his or her qualifying service elsewhere. This consideration further undermines the State's proffered funding rationale.

APPENDIX A

4 U.S.C. 111. Same; taxation affecting Federal employees; income tax

The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States, a territory or possession or political subdivision thereof, the government of the District of Columbia, or an agency or instrumentality of one or more of the foregoing, by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

APPENDIX B

Kan. Stat. Ann. § 79-32,117 (Supp. 1990). Kansas adjusted gross income of an individual.

(a) The Kansas adjusted gross income of an individual means such individual's federal adjusted gross income for the taxable year, with the modifications specified in this section.

(b) There shall be added to federal adjusted gross income:

(i) Interest income less any related expenses directly incurred in the purchase of state or political subdivision obligations, to the extent that the same is not included in federal adjusted gross income, on obligations of any state or political subdivision thereof, but to the extent that interest income on obligations of this state or a political subdivision thereof issued prior to January 1, 1988, is specifically exempt from income tax under the laws of this state authorizing the issuance of such obligations, it shall be excluded from computation of Kansas adjusted gross income whether or not included in federal adjusted gross income. Interest income on obligations of this state or a political subdivision thereof issued after December 31, 1987, shall be excluded from computation of Kansas adjusted gross income whether or not included in federal adjusted gross income.

(ii) Taxes on or measured by income or fees or payments in lieu of income taxes imposed by this state or any other taxing jurisdiction to the extent deductible in determining federal adjusted gross income and not credited against federal income tax.

(iii) The federal net operating loss deduction.

(iv) Federal income tax refunds received by the taxpayer if the deduction of the taxes being

refunded resulted in a tax benefit for Kansas income tax purposes during a prior taxable year. Such refunds shall be included in income in the year actually received regardless of the method of accounting used by the taxpayer. For purposes hereof, a tax benefit shall be deemed to have resulted if the amount of the tax had been deducted in determining income subject to a Kansas income tax for a prior year regardless of the rate of taxation applied in such prior year to the Kansas taxable income, but only that portion of the refund shall be included as bears the same proportion to the total refund received as the federal taxes deducted in the year to which such refund is attributable bears to the total federal income taxes paid for such year. For purposes of the foregoing sentence, federal taxes shall be considered to have been deducted only to the extent such deduction does not reduce Kansas taxable income below zero.

(v) The amount of any depreciation deduction or business expense deduction claimed on the taxpayer's federal income tax return for any capital expenditure in making any building or facility accessible to the handicapped, for which expenditure the taxpayer claimed the credit allowed by K.S.A. 79-32,177, and amendments thereto.

(vi) Any amount of designated employee contributions picked up by an employer pursuant to K.S.A. 12-5005, 20-2603, 74-4919 and 74-4965, and amendment to such sections.

(c) There shall be subtracted from federal adjusted gross income:

(i) Interest or dividend income on obligations or securities of any authority, commission or instrumentality of the United States and its

possessions less any related expense directly incurred in the purchase of such obligations or securities, to the extent included in federal adjusted gross income but exempt from state income taxes under the laws of the United States.

(ii) Any amounts received which are included in federal adjusted gross income but which are specifically exempt from Kansas income taxation under the laws of the state of Kansas.

(iii) The portion of any gain or loss from the sale or other disposition of property having a higher adjusted basis for Kansas income tax purposes than for federal income tax purposes on the date such property was sold or disposed of in a transaction in which gain or loss was recognized for purposes of federal income tax that does not exceed such difference in basis, but if a gain is considered a long-term capital gain for federal income tax purposes, the modification shall be limited to that portion of such gain which is included in federal adjusted gross income.

(iv) The amount necessary to prevent the taxation under this act of any annuity or other amount of income or gain which was properly included in income or gain and was taxed under the laws of this state for a taxable year prior to the effective date of this act, as amended, to the taxpayer, or to a decedent by reason of whose death the taxpayer acquired the right to receive the income or gain, or to a trust or estate from which the taxpayer received the income or gain.

(v) The amount of any refund or credit for overpayment of taxes on or measured by income or fees or payments in lieu of income taxes imposed by this state, or any taxing jurisdiction, to the extent included in gross income for federal income tax purposes.

(vi) Accumulation distributions received by a taxpayer as a beneficiary of a trust to the extent that the same are included in federal adjusted gross income.

(vii) Amounts received as annuities under the federal civil service retirement system, from the civil service retirement and disability fund.

(viii) Amounts received by retired railroad employees as a supplemental annuity under the provisions of 45 U.S.C. 228b(a) and 228c(a)(1) *et seq.*

(ix) Amounts received by retired employees of a city and by retired employees of any board of such city as retirement allowances pursuant to K.S.A. 13-14,106, and amendments thereto, or pursuant to any charter ordinance exempting a city from the provisions of K.S.A. 13-14,106, and amendments thereto.

(x) For taxable years beginning after December 31, 1976, the amount of the federal tentative jobs tax credit disallowance under the provisions of 26 U.S.C. 280 C. For taxable years ending after December 31, 1978, the amount of the targeted jobs tax credit and work incentive credit disallowances under 26 U.S.C. 280 C.

(xi) For taxable years beginning after December 31, 1986, dividend income on stock issued by Kansas Venture Capital, Inc.

(xii) For taxable years commencing after December 31, 1984, and prior to January 1, 1990, the amount of any gain realized by a mortgagor resulting from the sale or other disposition of real estate due to the foreclosure of a mortgage upon such real estate or the voluntary conveyance of mortgaged property to the mortgagee, or by a debtor resulting from the release of liability on a contract for the purchase of real estate, to the extent included in the taxpayer's adjusted

gross income for federal income tax purposes. The provisions of this paragraph shall not apply to any gain realized by an investor from any such transaction concerning tax shelters which are required or would have been required to be registered with the federal Internal Revenue Service pursuant to Section 6111 of the Internal Revenue Code, except that, the number of investors under such section shall be determined by treating all members of a family as one investor to the extent they would qualify as class A or class B distributees under K.S.A. 79-1537, and amendments thereto.

(xiii) For taxable years beginning after December 31, 1989, amounts received by retired employees of a board of public utilities as pension and retirement benefits pursuant to K.S.A. 13-1246a and 13-1249 and amendments thereto.

(d) There shall be added to or subtracted from federal adjusted gross income the taxpayer's share, as beneficiary of an estate or trust, of the Kansas fiduciary adjustment determined under K.S.A. 79-32,135, and amendments thereto.

(e) The amount of modifications required to be made under this section by a partner which relates to items of income, gain, loss, deduction or credit of a partnership shall be determined under K.S.A. 79-32,131, and amendments thereto, to the extent that such items affect federal adjusted gross income of the partner.

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